REMARKS

The Examiner has rejected Claims 1-18 under 35 U.S.C. 103(a) as being unpatentable over Patel et al. in view of Borella et al. Applicant respectfully disagrees with such rejection, especially in view of the amendments made hereinabove.

Specifically, with respect to the independent claims, the Examiner has relied on Fig. 3, cols. 3-4, and Claims 1-3 from Patel to make a prior art showing of applicant's claimed:

> "a first network connection for communicatively connecting with said network and for detecting an incoming data packet arriving at said network device;
>
> a second network connection for communicatively connecting to said network and for detecting an outgoing data packet departing from said network device;" and
>
> "detecting an incoming data packet for said network device;
>
> storing a first timestamp for said incoming data packet;
>
> detecting an outgoing data packet from said network device;
>
> storing a second timestamp for said outgoing data packet" (see this or similar language in each of the independent claims).

Such excerpts and the remaining Patel reference, however, merely suggest the calculation of *network* latency based on *two incoming packets* detected *both from a server computer* (note Fig. 3). In sharp contrast, applicant teaches and claims "detecting an incoming data packet arriving at said network device" and detecting an outgoing data packet departing from said network device" (or similar language). As will soon be emphasized further, this distinction is paramount, since applicant's claimed invention measures network device latency, not necessarily network latency.

Still yet, the Examiner has relied on Fig. 2 and Claim 4 from Borella to make a prior art showing of applicant's claimed:

> "a correlator for correlating said incoming data packet with said outgoing data packet; and
>
> a calculator for calculating a latency period between detecting said incoming data packet and detecting said outgoing data packet" and
>
> "correlating said incoming data packet with said outgoing data packet; and
>
> calculating said latency for said network device based on said first timestamp and said second timestamp" (see this or similar language in each of the independent claims).

Such excerpts and the remaining Borella reference, however, merely suggest the calculation of *network* latency by sending an outgoing packet and awaiting for a return incoming packet. To this end, if the incoming packet is delayed, the *network* latency will be determined to be augmented, etc.

In sharp contrast, applicant teaches and claims "calculating said latency for said network device," not for the *network itself.*

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art and not based on applicant's disclosure. *In re Vaeck*,947 F.2d 488, 20 USPQ2d 1438 (Fed.Cir.1991).

Applicant respectfully asserts that at least the first and third elements of the *prima facie* case of obviousness have not been met. First, the third element of the *prima facie* case of obviousness has not been met, since the prior art references, when combined, fail to teach or suggest all the claim limitations, as set forth hereinabove. Moreover, with respect to the first element of the *prima facie* case of obviousness, the same has not been met, since Patel's two incoming packet latency analysis is: 1) *non-analogous* with respect to, 2) *teaches away* from, and 3) would be *inoperable* with Borella's incoming/outgoing packet latency analysis.

A notice of allowance or a specific prior art showing of such claimed features, in combination with the remaining claim elements, is respectfully requested.

Despite the foregoing paramount distinguishing factors and in the spirit of expediting the prosecution of the present application, applicant now claims, in each of the independent claims:

> "wherein an arrival of said incoming data packet precedes a departure of said outgoing data packet and processing by said network device, and said latency of said processing on said network device is calculated."

Thus, applicant has emphasized that it is network device processing latency that is being claimed, not latency of the network communication links themselves. Moreover, this is accomplished by an analysis specific to an incoming packet and an outgoing packet where an arrival of the incoming data packet precedes a departure of the outgoing data packet and processing by the network device. This feature clearly distinguishes Borella (in addition to Patel), whose incoming packet arrives after the outgoing packet for the purpose of calculating the latency of the *network itself.*

It is further noted that the Examiner's application of the proposed prior art combination to applicant's dependent claims is replete with deficiencies.

For example, with respect to the subject matter of Claim 3 et al., the Examiner states that Patel or Borella show packets at various stages of transit. Applicant notes that both Patel and Borella calculate network latency using two different packets (i.e. two incoming packets, an outgoing packet and response incoming packet, etc.). In sharp contrast, applicant teaches and claims "comparing said incoming data packet with said outgoing data packet to determine whether said incoming data packet and said outgoing data packet represent at least partially the same data packet at different stages of transit" (emphasis added).

With respect to the subject matter of Claims 4, 6 et al.; the Examiner makes a simple assertion that the related claim limitations would be obvious or must be included. The Examiner makes such assertions without a specific prior art showing.

It thus appears that the Examiner has dismissed the foregoing limitations under Official Notice. Applicant thus formally requests a specific showing of the subject matter in ALL of the claims in any future action. Note excerpt from MPEP below.

> "If the applicant traverses such an [Official Notice] assertion the examiner should cite a reference in support of his or her position." See MPEP 2144.03.

Again, a notice of allowance or a specific prior art showing of such claimed features, in combination with the remaining claim elements, is respectfully requested.

In the event a telephone conversation would expedite the prosecution of this application, the Examiner may reach the undersigned at (408) 505-5100. If any fees

are due in connection with the filing of this paper, the Commissioner is authorized to charge such fees to Deposit Account No. 50-1351 (Order No. NAI1P070/99.067.01).

Respectfully submitted,

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